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No. 81-2400

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITOL AGGREGATES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, AND FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

MARY-HELEN MAUTNER
Acting Associate Solicitor

ALLEN H. FELDMAN
RUTH E. PETERS
Attorneys

Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether regulation of safety practices in sand and gravel surface mining quarries is within the scope of Congress' Commerce Clause power.

2. Whether the Federal Mine Safety and Health Act of 1977 is applicable to petitioner's sand and gravel mining operations.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A28) is not reported. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. A17-A27) is reported at 3 F.M.S.H.R.C. 1388; the initial decision of the Commission remanding the case to the administrative law judge is reported at 2 F.M.S.H.R.C. 1040. The decision of the administrative law judge on remand (Pet. App. A1-A16) is reported at 2 F.M.S.H.R.C. 2373; the administrative law judge's initial decision is reported at 2 F.M.S.H.R.C. 869.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1982. The petition for a writ of certiorari was filed on July 2, 1982, as of June 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner mines sand and gravel in Austin and Del Rio, Texas, and operates a limestone quarry and two cement manufacturing plants in San Antonio, Texas and a cement plant in Austin (Tr. 55, 228-229, 239). Inspectors from the Mine Safety and Health Administration issued citations to petitioner for violations of safety regulations at its Austin sand and gravel quarry and its San Antonio limestone quarry and cement plant operation. The Secretary of Labor thereafter sought administrative assessment of civil penalties. See 30 U.S.C. (Supp. IV) 814(a) and 820.

2. Petitioner moved to dismiss the proceedings on the ground that the Secretary had failed to show that petitioner's operations affected interstate commerce. Petitioner also contested the underlying citations. The administrative law judge denied the motion to dismiss (ALJD 1-2), affirmed six of the citations, and assessed petitioner a total penalty of $215 (ALJD 2-7).[1] Upon discovering that the parties had been unable to file post hearing briefs because they had not received the transcript, the administrative law judge entered an order staying his decision. See Pet. App. A16 n.3.

The Federal Mine Safety and Health Review Commission held that the administrative law judge lacked authority to stay his decision (CD 2).[2] Accordingly, the Commission vacated the stay and the decision on the merits and remanded the case to allow the parties an opportunity to review the transcript and submit briefs to the administrative law judge (CD 2-3).

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[1] "ALJD" refers to the administrative law judge's initial decision, a copy of which has been lodged with the Clerk of this Court.

[2] "CD" refers to the Commission's initial decision, a copy of which has been lodged with the Clerk of this Court.

On remand, the administrative law judge again held (Pet. App. A1-A6) that petitioner's activities affect interstate commerce and are, therefore, subject to regulation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 801 *et seq.*

3. Petitioner sought discretionary review before the Commission, which granted review as to two of the citations, but declined to review the judge's denial of the motion to dismiss (Pet. App. A17-A27). The Commission vacated one of the citations (*id.* at A24-A27) and affirmed the other (*id.* at A19-A24).

The court of appeals summarily affirmed (Pet. App. A28).

ARGUMENT

1. Petitioner contends (Pet. 11-27) that regulation of sand and gravel mining is beyond the scope of the Commerce Clause (Article 1, Section 8, Clause 3) because there is no rational basis for Congress' explicit finding that "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce" (30 U.S.C. (Supp. IV) 801(f)). As this Court recently noted, however, "[i]n enacting the [Federal Mine Safety and Health Act of 1977], Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." *Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981). Congress' finding was "based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries" (*id.* at 602 n.7).

The loss of income to miners and mine operators as a result of work-related illness and injury directly affects their ability to purchase goods and services and, therefore,

affects the flow of commerce whether the mined product is coal or sand and gravel. Similarly, the disruption of production affects the flow of commerce whether the product is coal or sand and gravel. It is immaterial whether the product of any particular mining enterprise is destined for out-of-state shipment. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154-157 (1971); *Wickard* v. *Filburn*, 317 U.S. 111, 118-129 (1942). In determining to regulate the safety practices of the mining industry, "Congress appropriately considered the 'total incidence' " of existing practices. *Perez* v. *United States, supra*, 402 U.S. at 154, quoting *Katzenbach* v. *McClung*, 379 U.S. 294, 301 (1964). See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276-277, 281 (1981).

The history of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 721 *et seq.*, one of the predecessors of the Federal Mine Safety and Health Act of 1977, confirms the basis for Congress' exercise of power over sand and gravel mines. The Senate Committee on Labor and Public Welfare specifically rejected proposals to exempt sand, gravel, and crushed stone operations from the scope of the statute. S. Rep. No. 1296, 89th Cong., 2d Sess. 6 (1966). Data before the committee concerning the frequency and severity of injuries "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries" (*id.* at 7). See *Metal and Nonmetallic Mine Safety: Hearings on H.R. 8989, S. 2972, S. 996, and S. 3094 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 2d Sess. 130, 211-212 (1966).[3] In 1977,

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[3]It is true that Section 3(b) of the 1966 Act (30 U.S.C. 722(b); emphasis added) authorized the Secretary of Interior to "decline to assert jurisdiction * * * over any class or category of mines where, in the opinion of the Secretary, the effect of the operations of such mines on commerce is not *sufficiently substantial* to warrant the exercise of jurisdiction * * *, *and the record of injuries and accidents in such class*

Congress established "a single mine safety and health law applicable to the entire mining industry." S. Rep. No. 95-181, 95th Cong., 1st Sess. 13 (1977). The basis for the exercise of federal jurisdiction over sand and gravel mines was the same in 1977 as in 1966. See 30 U.S.C. (Supp. IV) 801(f).[4]

2. Petitioner also contends (Pet. 8-11, 27-32) that the Secretary failed to prove that its mining operations affect commerce and are therefore subject to federal mine safety and health regulation. The short answer to that contention is that no such proof is required. The Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce" (30 U.S.C. (Supp. IV) 803). Congress specifically found that the disruption of production and the loss of income to operators and miners caused by accidents in all mines "impede[] and burden[] commerce." 30 U.S.C. (Supp. IV) 801(f). Accordingly, proof that the operations of a particular mine affect commerce is unnecessary. "Where the *class*

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or category of mines warrants such a declination of jurisdiction." See H.R. Conf. Rep. No. 1921, 89th Cong., 2d Sess. 1 (1966). Contrary to petitioner's argument (Pet. 22 & n.1), however, this provision does not reflect a lack of constitutional power. Congress plainly asserted jurisdiction over the safety practices in mines, including sand and gravel operations, but gave the Secretary authority to *decline* to exercise that jurisdiction.

Section 3(b) was prompted by concern as to the effect the bill's inspection and mandatory reporting requirements might have on "small mine operators, *including* sand, gravel, and crushed stone operations which often employ a few persons and whose operation is often of short duration." S. Rep. No. 1296, *supra*, at 7 (emphasis added). Petitioner has 140 employees (ALJD 2).

[4]"Since the Mine Safety and Health Act * * * is narrowly and explicitly directed at inherently dangerous industrial activity, the inclusion of stone quarries in the statute is presumptively equivalent to a finding that the stone quarrying industry is inherently dangerous." *Donovan* v. *Dewey*, *supra*, 452 U.S. at 602 n.7.

of activities is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States, supra*, 402 U.S. at 154, quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, 452 U.S. at 277.

In any event, the administrative law judge correctly concluded that petitioner's mining operations affect commerce (ALJD 2). It is settled that production of goods may affect commerce though none of the goods is transported out-of-state. See, *e.g., Wickard* v. *Filburn, supra*; *Marshall* v. *Kraynak*, 604 F. 2d 231, 232 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (intrastate sales of coal); *Secretary of Interior* v. *Shingara*, 418 F. Supp. 693, 694-695 (M.D. Pa. 1976), aff'd, 594 F. 2d 855 (3d Cir. 1979). Nonetheless, petitioner maintains that absent evidence that its intrastate sales satisfied a market that would otherwise be satisfied by out-of-state suppliers, there is no basis for the conclusion that petitioner's operations affect commerce. There is no barrier to interstate shipment of sand, gravel, or cement. Even if none of petitioner's customers currently buys these products from out-of-state suppliers, there is no reason to assume that they will not do so in the future. The administrative law judge reasonably inferred that out-of-state suppliers compete with petitioner and other Texas suppliers. Petitioner has suggested nothing to undermine the reasonableness of that inference. Moreover, petitioner's use of the facilities of interstate commerce to deliver its products within the State of Texas is itself sufficient to support application of the Act.[5]

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[5]In addition, of course, petitioner has 140 employees whose ability to purchase goods that move in commerce depends on petitioner's operations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

MARY-HELEN MAUTNER
Acting Associate Solicitor

ALLEN H. FELDMAN
RUTH E. PETERS
Attorneys
Department of Labor

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